

Constantin V. Roboostoff [69328]  
**ROBOOSTOFF & KALKIN**  
369 Pine Street, Suite 610  
San Francisco, California 94104  
Telephone: (415) 732-0282  
Facsimile: (415) 732-0287

Attorneys for Plaintiff  
Maria Abraham

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Maria Abraham,

Plaintiff,

v.

ESIS, Inc., Ace American  
Insurance Company,

Defendants.

Case No. C 07-04014 JCS

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO MOTION TO  
COMPEL ARBITRATION**

Date: February 1, 2008

Time: 9:30 a.m.

Judge: Judge Joseph C. Spero

Dept: Courtroom A, 15<sup>th</sup> Floor

**I. INTRODUCTION.**

The Court should refuse to consider defendants' motion to compel arbitration for the following reasons:

(i) Defendants failed to comply with FRCP 26(a)(1) and the Court's Case Management And Pretrial Order, dated November 9, 2007, where the parties were ordered to exchange initial disclosures by November 16, 2007;

(ii) Defendants' motion is not supported by admissible evidence, as the supporting declaration contains inadmissible hearsay; contains inadmissible lay opinion; does not

1 affirmatively show that the declarant is competent to testify to the matters contained therein;  
 2 contains conclusions of fact or law, and not evidentiary facts; and

3 (iii) Defendants' Employment Dispute Arbitration Policy is procedurally and  
 4 substantively unconscionable.

## 5 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

### 6 **A. Statement of Facts.**

7 On March 15, 2000, plaintiff Maria Abraham ("plaintiff") signed a document entitled  
 8 "ACE Employee Guide: Receipt and Agreement" ("ACE Employee Guide"). *Declaration of*  
 9 *Maria Abraham ("Abraham Decl."), Ex. A.*

10 All employees were required to sign the ACE Employee Guide as a condition of their  
 11 employment. *Abraham Decl.*, ¶ 2.

12 At no time did any of defendants' agents or employees explain to plaintiff the provisions  
 13 in the ACE Employee Guide dealing with employment dispute mediation and arbitration. Nor  
 14 did anyone ever tell plaintiff that she had the option to revise or opt out of the provisions dealing  
 15 with employment dispute mediation and arbitration. *Abraham Decl.*, ¶ 3.

16 Plaintiff always understood and was led to believe that signing the ACE Employee Guide  
 17 was mandatory and a condition of her continued employment with defendants. *Abraham Decl.*, ¶  
 18 4.

### 19 **B. The Present Action.**

20 Plaintiff filed her Complaint in the instant action on August 6, 2007.

21 Defendants filed their Answer to plaintiff's Complaint on September 26, 2007.

22 On November 9, 2007, this Court filed its Civil Minute Order stating in pertinent part that  
 23 the parties "shall" exchange initial disclosures by November 16, 2007.

24 On November 26, 2007, plaintiff's counsel requested defendants to comply with the  
 25 Court's order and provide defendants' initial disclosure. *Declaration of Constantin V.*

1 *Robostoff, Ex. 1.*

2 To date, defendants have not complied with FRCP 26(a)(1) and this Court's order.

3 **III. LEGAL DISCUSSION.**

4 **A. The Court Should Refuse To Consider Defendants' Motion To**  
 5 **Compel Arbitration Because Defendants Failed To Comply With**  
 6 **FRCP 26(a)(1) And The Court's Case Management And Pretrial**  
 7 **Order, Dated November 9, 2007.**

8 Except as otherwise provided by stipulation or court order, each party must disclose to  
 9 other parties certain information regarding witnesses, documents, damage computations and  
 10 liability insurance without awaiting a discovery request. FRCP 26(a)(1).

11 Absent substantial justification for failure to make the required initial disclosure, a party  
 12 "is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a  
 13 motion any witness or information not so disclosed." FRCP 37(c)(1) (emphasis added.)

14 Here, defendants not only violated FRCP 26(a)(1), but blatantly disregarded the Court's  
 15 order directing them to comply with Rule 26(a)(1) by November 16, 2007. In addition, on  
 16 November 26, 2007, plaintiff's counsel requested defendants to comply with the Court's order.

17 Without response or explanation, defendants failed to comply with the Court's order and  
 18 Rule 26(a)(1). As such, defendants should be precluded from using any evidence in support of  
 19 the instant motion that was not previously disclosed.

20 Since defendants failed to disclose any evidence pursuant to Rule 26(a)(1) , it follows that  
 21 their motion should be denied because it is unsupported by any admissible evidence.

22 **B. The Court Should Refuse To Consider Defendants' Motion To**  
 23 **Compel Arbitration Because It Is Not Supported By Admissible**  
 24 **Evidence, As The Supporting Declaration Is Incompetent.**

25 In support of the instant motion, defendants submitted the Declaration of Denise Carson.  
 26 As detailed in plaintiff's objection to Ms. Carson's Declaration, the Declaration does not  
 27 constitute admissible evidence in that it is made by a witness without personal knowledge of the  
 28 facts stated therein; contains inadmissible hearsay, opinions and conclusions; and does not

1 affirmatively show that the witness would be competent to testify at trial. FRCP 56(e).

2 In short, defendants' motion should be denied because it is unsupported by any  
3 admissible evidence.

4 **C. The Court Should Refuse To Consider Defendants' Motion To**  
5 **Compel Arbitration Because Defendants' Employment Dispute**  
6 **Arbitration Policy ("ACE Agreement") Is Procedurally And Substantively**  
7 **Unconscionable.**

8 **1. Governing Legal Principles.**

9 Both procedural and substantive unconscionability are required to invalidate an  
10 arbitration agreement. (*Armendariz v. Foundation Health Psychcare Services, Inc.*, (2000) 24  
11 Cal.4th 83, 114.) Procedural unconscionability focuses largely on oppression and the manner in  
12 which the agreement was negotiated. (*Kinney v. United HealthCare Services, Inc.* (1999) 70  
13 Cal.App.4th 1322, 1329.) Substantive unconscionability, on the other hand, focuses on the terms  
14 of the agreement and the presence of overly harsh or one-sided results. (*Id.* at p. 1330.) The two  
15 aspects need not be present to the same degree. "[T]he more substantively oppressive the contract  
16 term, the less evidence of procedural unconscionability is required to come to the conclusion that  
17 the term is unenforceable, and vice versa." (*Armendariz*, supra, 24 Cal.4th at p. 114.)

18 To determine whether an arbitration agreement is procedurally unconscionable the court  
19 must examine the manner in which the agreement was negotiated and the circumstances of the  
20 parties at that time. (*Kinney*, supra, 70 Cal.App.4th at p. 1329). An inquiry into whether the  
21 company's arbitration agreement involves oppression or surprise is central to that analysis. A  
22 contract is oppressive if an inequality of bargaining power between the parties precludes the  
23 weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the  
24 contract. (*Stirlen v. Supercuts, Inc.* 51 Cal.App.4th 1519, 1532.) "Surprise involves the extent to  
25 which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form  
26 drafted by the party seeking to enforce the disputed terms." (*Id.*) "'Oppression' arises from an  
27 inequality of bargaining power which results in no real negotiation and 'an absence of

1 meaningful choice.’ [Citation.]” (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d  
 2 473.) An arbitration agreement that is an essential part of a “take it or leave it” employment  
 3 condition, without more, is procedurally unconscionable. (*Armendariz*, supra, 24 Cal.4th at pp.  
 4 113-115.)

## 5 **2. The ACE Agreement Is Procedurally Unconscionable.**

6 The California Supreme Court held that it is procedurally unconscionable to require  
 7 employees, as a condition of employment, to waive their right to seek redress of grievances in a  
 8 judicial forum. *Id.* at 114-15. Here, the ACE Agreement is procedurally unconscionable because  
 9 it is a “take it or leave it” employment condition and the provisions are so located as to easily  
 10 escape attention and constitute surprise. (*Stirlen v. Supercuts*, supra, 51 Cal.App.4th at p. 1532;  
 11 *Steven v. The Fidelity and Casualty Company of New York* (1962) 58 Cal.2d 862, 881-882.)

12 The ACE Employee Guide states that, “**All employees must have a signed**  
 13 **acknowledgement and agreement form in their personnel file.**” *Declaration of Denise*  
 14 *Carson* (“*Carson Decl.*”), *Ex. F*, pg. 1. There is little doubt that signing the ACE Employee  
 15 Guide was a “take it or leave it” employment condition. *Abraham Decl.*, ¶¶ 2,3 & 4. In *Circuit*  
 16 *City Stores, Inc. v. Adams*, 279 F.3d 889 (9<sup>th</sup> Cir.2002), the Ninth Circuit, applying *Armendariz*  
 17 (the controlling California Supreme Court case), found an arbitration agreement procedurally  
 18 unconscionable because it was a “take it or leave it” proposition. 279 F.3d at 893. The court  
 19 reasoned that “[t]he agreement is a prerequisite to employment, and job applicants are not  
 20 permitted to modify the agreement’s terms — they must take the contract or leave it.” (*Id.*) The  
 21 Ninth Circuit found an agreement in *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d  
 22 778, 783 (9<sup>th</sup> Cir.2002), procedurally unconscionable for the same reason.

23 In *Ingle v. Circuit City Stores, Inc.* (2003) 328 F.3d 1165,1172-73 (9<sup>th</sup> Cir.2003)(*Ingle I*),  
 24 the Ninth Circuit struck a Circuit City arbitration agreement as both procedurally and  
 25 substantively unconscionable because the employee Ingle did not have an opportunity to opt out  
 26

1 by preserving a judicial forum. The *Ingle I* court rejected Circuit City's argument that the  
 2 agreement was enforceable because Ingle had time to consider the arbitration terms, but chose to  
 3 accept employment anyway. *Id.* at 1172. *Ingle I* reasoned that "[t]he amount of time [the  
 4 employee] had to consider the contract is irrelevant." *Id.* (emphasis added). *Ingle I* addressed  
 5 the availability of alternative employment by "follow[ing] the reasoning in *Szetela v. Discover*  
 6 *Bank*, 97 Cal. App.4th 1094, 118 Cal.Rptr. 2d 862 (2002), in which the California Court of  
 7 Appeal held that *the availability of other options does not bear on whether a contract is*  
 8 *procedurally unconscionable.*" *Ingle I*, 328 F.3d at 1172 (citing *Szetela*, 97 Cal.App.4th at 1100,  
 9 118 Cal.Rptr.2d 862.) (emphasis added). "Rather, when a party who enjoys greater bargaining  
 10 power than another party presents the weaker party with a contract without a meaningful  
 11 opportunity to negotiate, 'oppression and, therefore, procedural unconscionability, are present.'" *(Id.)*  
 12 (citing *Ferguson*, 298 F.3d at 784; *Szetela*, 97 Cal.App.4th 1100, 118 Cal.Rptr.2d 862.)

13 Here, in order to ascertain one's legal rights and remedies, an ACE employee has to go  
 14 on-line, review the Guide, and then click on to several icons before actually getting to the  
 15 provisions dealing with arbitration. *Carson Decl.*, ¶¶ 8, 9 & 11, *Ex. F*, pg. 1. In addition,  
 16 although the CIGNA receipt, dated November 9, 1994, specifically references its arbitration  
 17 policy (*Carson Decl.*, *Ex. A*), the ACE receipt, dated March 15, 2000, does not. *Carson Decl.*,  
 18 *Ex. J*. In other words, "the provisions are so located as to easily escape attention." (*Steven v. The*  
 19 *Fidelity and Casualty Company of New York*, *supra*, 58 Cal.2d at p. 881-882.)

20 In conclusion, the ACE Agreement is procedurally unconscionable.

### 21 **3. The ACE Agreement Is Substantively Unconscionable**

22 Once the court determines that the agreement is procedurally unconscionable, it then must  
 23 determine whether "other factors are present which, under established legal rules-legislative or  
 24 judicial-operate to render it unenforceable." (*Armendariz*, *supra*, 24 Cal.4th at p. 113.)  
 25 Substantive unconscionability centers on the "terms of the agreement and whether those terms  
 26

1 are so one-sided as to shock the conscience.” (*Kinney*, supra, 70 Cal.App.4th at p. 1330.)

2 In *Ingle I*, the court determined that Circuit City’s arbitration agreement was substantively  
3 unconscionable because, *inter alia*, of provisions concerning the prohibition of class actions, the  
4 filing fee, cost-splitting, remedies, and Circuit City’s unilateral power to modify or terminate the  
5 arbitration agreement. *Ingle I*, 328 F.3d at 1172-73.

6 In *Ingle I*, the court found the arbitration agreement to be objectionably one-sided even  
7 though Circuit City argued that the agreement subjected Circuit City to the same terms that apply  
8 to its employees, “[B]ecause the possibility that Circuit City would initiate an action against one  
9 of its employees is so remote, the lucre of the arbitration agreement flows one way: the employee  
10 relinquishes rights while the employer generally reaps the benefits of arbitrating its employment  
11 disputes.” (*Id.* p. 1174.)

12 The same situation exists here because although the ACE Agreement provides that ACE  
13 must also utilize arbitration, there is very likelihood that it would do so, especially when it goes  
14 on to state that the relationship remains “at will,” which means that ACE can terminate an  
15 employee at anytime without going through arbitration. *Carson Decl., Ex. I, pg. 2.*

16 In *Ingle I*, the court found that the agreement was “substantively unconscionable” because  
17 it barred “class-wide” arbitration. (*Id.* p. 1175-76.) The ACE Agreement also bars “class-wide”  
18 arbitration. *Carson Decl., Ex. I, pg. 2.*

19 In *Ingle I*, Circuit City required an employee to pay a filing fee of \$75.00 to Circuit City if  
20 an employee wanted to submit an arbitration application. The court found the fee provision to be  
21 substantively unconscionable because when an employer imposes mandatory arbitration as a  
22 condition of employment, the arbitration agreement or arbitration process cannot require the  
23 employee to bear any *type* of expense that the employee would not be required to bear if he or  
24 she were free to bring the action in court. (*Id.* p. 1177-78.)

1 The ACE agreement not only requires an employee to pay a filing fee of \$100.00 to ACE  
 2 American Insurance Company if an employee wishes to submit an arbitration application, it  
 3 encourages employees to share in the cost of arbitration. *Carson Decl., Ex. I* [“*Ace Employment*  
 4 *Dispute Arbitration Fee Sharing Form*”].

5 In *Ingle I*, the court also found the agreement substantively unconscionable because it  
 6 gave Circuit City the unilateral right to alter or terminate the agreement. (*Id.* p. 1179.) Here, the  
 7 ACE Employee Guide provides under the heading, “What’s In This Guide,” that, “ACE reserves  
 8 the right to change any or all policies, programs and benefit plans in whole or in part at any time,  
 9 with or without notice to you.” *Carson Decl., Ex. F, [Employee Dispute Arbitration Policy, pg.*  
 10 *I”]*. In addition, ACE’s Employment Dispute Arbitration Rules And Procedures provides that,  
 11 “The arbitration process may be changed in writing by ACE.” *Carson Decl., Ex. I, ¶ 28.*

12 Plaintiff submits that the provisions contained in the ACE Agreement are substantively  
 13 unconscionable.

### 14 **III. CONCLUSION.**

15 For the reasons stated above, Plaintiff respectfully requests that this Court issue an Order  
 16 denying Defendants’ motion to compel arbitration in its entirety.

17 Dated: January 4, 2008

Respectfully submitted,

18 ROBOOSTOFF & KALKIN

19  
 20 By: /S/

Constantin V. Roboostoff  
 Attorneys for Plaintiff  
 Maria Abraham

21  
 22  
 23  
 24  
 25  
 26  
 27 Declaration of Maria Abraham in Opposition to Motion to Compel Arbitration  
 Case No. C07 4014 JCS